

ORIGINAL

**WHATCOM COUNTY
CONTRACT NO.
201402013**

JOINT AGENCY AGREEMENT (2014)

SWISE 1.10
3/18/2014

SUMAS MOUNTAIN/SWIFT CREEK SEDIMENT MANAGEMENT PROJECT

**U.S. EPA REGION 10
WASHINGTON STATE DEPT. OF ECOLOGY
WHATCOM COUNTY FLOOD CONTROL ZONE DISTRICT
WHATCOM COUNTY, WASHINGTON**

USEPA SF



1467272

I. INTRODUCTION

Whatcom County (the County), the Whatcom County Flood Control Zone District (Flood Control Zone District), the Washington State Department of Ecology (Ecology), and the U.S. Environmental Protection Agency, Region 10 (EPA) (collectively, "the Parties") enter into this Joint Agency Agreement ("Agreement") to reduce the risks associated with human exposure to naturally occurring asbestos within sediment transported through the Swift Creek channel from a naturally-occurring landslide on Sumas Mountain, and/or removed, dredged, transported, or otherwise managed through human activity at certain locations. To address these concerns, the Parties have evaluated alternatives, considered public comments, identified a Project Area (see map at App. 1), and developed a framework known as the Swift Creek Sediment Management Project ("the Project"). As described below, the Project consists of a set of actions intended to address flooding and asbestos concerns for a period of ten years or more.

In order to implement the Project, the Parties must first satisfy a number of legal requirements, including those established by the Washington Model Toxics Control Act (MTCA), the Washington State Environmental Policy Act (SEPA), and the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The Parties intend for actions selected through these processes to be the subject of this Agreement. The Parties further intend for those elements of the Project implemented under MTCA to be implemented pursuant to a consent decree entered in Superior Court of the State of Washington.

As of the date of entry of this Agreement, EPA has completed an Engineering Evaluation/Cost Analysis identifying certain Project elements that could be implemented as removal actions under CERCLA. Ecology has not yet proposed any decisions under MTCA encompassing Project elements. When such decisions are proposed, they still must be submitted (together with evaluation under SEPA) for public comment and any proposed decision may be altered based upon public comment. Given this, no specific MTCA decision can be assumed as of the date of entry of this Agreement. Further, assuming Ecology makes decisions encompassing Project elements under MTCA, a consent decree to implement the decisions still must be negotiated, submitted for public comment, and approved for entry by the court. Given this, no final consent decree can be assumed as of the date of entry of this Agreement.

Understanding these uncertainties, the commitments of the County and the Flood Control Zone District under this Agreement are contingent upon the successful negotiation of a consent decree

with Ecology that establishes or obliges a third party entity such as a trust to manage sediment-bearing, naturally-occurring asbestos as part of the Project, including holding ownership of property to be used for managing such sediment.¹ The commitments of Ecology are similarly contingent upon the completion of all MTCA decision-making processes (including SEPA evaluation) necessary to implement the Project, as well as contingent upon the successful negotiation and entry of a consent decree with the County and the Flood Control Zone District.

In addition to the foregoing uncertainties and contingencies, each of the Parties have legal and fiscal authorities and limitations that affect their ability to make binding commitments within the responsible execution of their duties. These authorities and limitations are further described within this Agreement.

Based on all of the above considerations, this Agreement creates no legal right or obligation on the part of any signatory or other entity. Nevertheless, so that progress on the Project can timely begin, this Agreement sets forth the joint expectation of the Parties for the particular contributions to the Project from each signatory hereto. This Agreement is intended to promote the full implementation of the Project in order to reduce the concerns with flooding and asbestos contamination from Sumas Mountain and Swift Creek.

II. BACKGROUND

The Parties acknowledge that a continuing naturally-occurring landslide on Sumas Mountain contributes tons of sediment each year to Swift Creek. This sediment contains naturally-occurring asbestos (NOA), which deposits in and around Swift Creek and the Sumas River and is likely to continue being deposited into the distant future. The continual deposition of this sediment in creek channels contributes to the risk of flooding from Swift Creek and the Sumas River. The Parties acknowledge the social and economic impacts to the local community that have to some extent occurred and are likely to occur in the future from recurrent flooding. The Parties also recognize the health-related consequences to humans that may result from certain kinds of exposure to asbestos-containing sediments when they are dry and disturbed. At the same time, the Parties understand that no single Party has the full legal authority or resource capacity to address these problems entirely.

To address these concerns as practically and methodically as possible within their present authorities and means, the Parties have investigated the problem and have analyzed (or are analyzing) alternatives consistent with SEPA, MTCA, and CERCLA processes. Consistent with SEPA, a draft Environmental Impact Statement (EIS) was prepared by the County, evaluating potential impacts of a proposed Swift Creek Sediment Management Action Plan (SCSMAP). The draft EIS was released for public comment on February 15, 2013. Following the public comment period, the County finalized the EIS on June 12, 2013, and the County Council approved the SCSMAP on July 23, 2013. Consistent with CERCLA, an Engineering Evaluation/Cost Analysis (EE/CA) was prepared by EPA and released for public comment on August 1, 2013, with the comment period closing on September 1, 2013. Following public comment, EPA finalized the EE/CA.

¹ The willingness of the County, the Flood Control Zone District, and Ecology to enter into any consent decree will depend upon the specific terms of that decree.

III. PROJECT ELEMENTS

Through the parallel SEPA, MTCA, and CERCLA processes, EPA, Ecology, the County, and the Flood Control Zone District have coordinated their efforts within their respective legal authorities, in order to promote consistent and complementary outcomes. These outcomes collectively comprise the Swift Creek Sediment Management Project ("the Project"), which as presently understood by the Parties generally consists of the following common elements (see Appendix 1):

- Assess repository locations and develop approved site(s)
- Assess and, if feasible, re-route North Fork of Swift Creek
- Construct in-stream sediment traps in the Canyon Reach of Swift Creek
- Construct Upper Goodwin Reach debris flow/setback levee
- Construct sediment basin(s) on the Goodwin Reach of Swift Creek
- Dredge sediments in Swift Creek channel
- If necessary, construct Lower Goodwin Reach setback levee and South Pass setback levee
- Implement education and outreach programs
- Implement institutional controls and access restrictions to prevent exposure and protect the constructed facilities
- Operate and maintain the constructed features, including sediment collection and containment structures
- Relocate and/or stabilize in place dredged materials along Oat Coles Reach

The Parties recognize that these Project elements together comprise only an interim strategy for intercepting natural releases and controlling sources of asbestos to reduce human exposure. The Parties understand that the Project will not stop the Sumas Mountain landslide nor eliminate the potential for flooding from Swift Creek or the Sumas River. Rather, the Project aims to reduce the likelihood of flooding and reduce the transport of asbestos-containing sediment downstream and across the floodplain. The Project is intended to provide time to develop and implement a long-term plan to further diminish the impact of ongoing deposition of asbestos-containing sediment in the Sumas River Basin.

IV. PROJECT IMPLEMENTATION

To implement the Project, the Parties each agree to seek funding and resources which, when combined, will allow for full implementation of the Project identified above. These commitments, as they are presently understood, are listed below. The commitments made by Ecology, the County, and the Flood Control Zone District are dependent on the contingencies identified in the Introduction to this Agreement.

Joint Commitments. EPA, Ecology, the County, and the Flood Control Zone District agree to:

- Establish a working group for the purpose of identifying data needs, coordinating education and outreach, and developing designs for implementing the Project.
- Maintain a working group for the purpose of developing annual work plans, taking into account the availability of resources, the assessment of priorities, and other factors.
- Continue to encourage other entities, including private parties, the State Department of Natural Resources, and the Army Corps of Engineers, to participate in the implementation of the Project and planning for long-term needs.
- Promote land uses that minimize exposure to NOA-bearing sediments through provision of public information, development of land use controls if and as determined to be necessary by the appropriate jurisdiction, and monitoring of future activities.
- Within the authority of each Party, pursue acquisition of property upon which the Project can be implemented.

EPA Commitments. Subject to the limitations below, EPA anticipates making the following contributions to the Project:

- Provide technical assistance and regulatory input for design and construction of the Project, including agency staff, contractor assistance, laboratory analysis, and other resources.
- Excavate and/or stabilize dredged materials along the Oat Coles Reach.
- Transport dredged materials and place at nearby retention facilities or at staging areas, if the Parties determine that such material is appropriate and useful for construction of other Project elements.
- Identify, design, and construct one or more repositories in the local area, to safely store sediment excavated from the sediment traps and other elements of the Project.
- Participate jointly with the other Parties in planning the Project to ensure coordination of EPA work with work performed by other Parties.
- Coordinate with other federal agencies that have regulatory authority and/or can provide technical assistance relating to the Project.

EPA's participation in the Project, as indicated above, relies upon its authority under CERCLA to respond to releases of hazardous substances such as asbestos. Of most relevance to the Project, CERCLA and its implementing regulations establish three important limitations on EPA's response authority. First, EPA may not provide for a response to "a naturally occurring substance . . . from a location where it is naturally found." 42 U.S.C. § 9604(a)(3). Second, for a site such as Swift Creek that is not included on EPA's National Priorities List (NPL), EPA may not ordinarily spend more than \$2 million or 12 months for removal actions to address any individual release. 42 U.S.C. § 9604(c)(1). Third, following the completion of selected removal actions, for sites that are not on the NPL, "post-removal site controls" will be the responsibility of either potentially responsible parties or the affected state or local authorities. 40 C.F.R. §

300.415(l). Subject to these three limitations plus other legal restrictions, and the approval of individual actions by delegated officials, EPA intends to carry out the activities identified above.

As required by the Antideficiency Act, 31 U.S.C. §§1341-1342, all commitments made by EPA in this Agreement are also subject to the availability of appropriated funds. Nothing in this Agreement, in and of itself, obligates EPA to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations that would be inconsistent with EPA's budget priorities. The County and Ecology agree not to submit a claim for compensation for services rendered to EPA in connection with any activities it carries out in furtherance of this Agreement. This Agreement does not exempt the County and Ecology from EPA (or any other federal) policies governing eligibility criteria and competition for assistance agreements. Any transaction involving reimbursement or contribution of funds between the parties to this Agreement will be handled in accordance with applicable laws, regulations, and procedures under separate written agreements.

Ecology Commitments. Subject to the limitations below, Ecology anticipates making the following contributions to the Project:

- Seek funding from the State legislature through budget request(s) (as further provided below), to pay for the balance of capital construction required by the Project.
- Monitor the expenditure of State funds in the form of grants, contracts, or other funding mechanisms established for the purpose of implementing the Project.
- Provide technical and program assistance with design and siting of repositories and other constructed facilities.
- Participate jointly with the other Parties in development, oversight and execution of a court-approved sediment management plan for Swift Creek, consistent with the limitations upon its authority, either directly or through an independent legal entity.
- Coordinate with other State agencies that have regulatory authority and/or can provide technical or financial assistance relating to the Project.

Ecology's participation in the Project is premised on its authority under MTCA to respond to releases or threatened releases of hazardous substances, which in the context of the Project include asbestos and other metals in Sumas Mountain landslide sediment once that sediment has been moved or otherwise managed through human intervention. In participating in the Project, Ecology may only act within the scope of its legal authority. Ecology's commitment to seek funding is dependent on a request being included in a budget proposal submitted by the Governor to the Washington Legislature. The inclusion of such a request in a budget proposal does not guarantee that any funds will be appropriated by the Washington Legislature. Further, Ecology's commitments of agency staff time and resources may be affected by, and potentially limited by, a lack of appropriated funds to the agency. Subject to these limitations, and the approval of individual actions by delegated officials, Ecology intends to carry out the activities identified above.

County and Flood Control Zone District Commitments. Subject to the limitations identified below, the Flood Control Zone District anticipates making the following contributions to the Project:

- Assess feasibility of rerouting North Fork of Swift Creek, to reduce transport of asbestos containing sediment
- Undertake alternatives analysis of potential repository locations
- Provide funds for routine operation, maintenance, and annual reports on such constructed facilities, consistent with a plan approved jointly by the Parties, within the limitations stated in the paragraph below, and with the understanding of the Parties delineated in the Introduction and the first paragraph under Project Implementation hereof
- Participate jointly with the other Parties in development, oversight and execution of a court-approved sediment management plan for Swift Creek, consistent with the limitations upon its authority
- Participate jointly with the other Parties in planning the Project to ensure coordination of discharging its responsibility with the work performed by the other Parties
- Coordinate within County government and with any other local governments having direct or substantive permitting or other approval authority relating to the Project

In keeping with the policy decisions and resulting *modus operandi* for flood control activities on Swift Creek and throughout Whatcom County for the past several decades, the responsibility for on-going and future activities on Swift Creek by local government will be executed through the Flood Control Zone District.

In the unlikely event that the Flood Control Zone District ceases to exist or is otherwise unable to perform its commitment hereunder within the time horizon of this Agreement, the County recognizes and agrees that its participation in this Agreement anticipates that it make sufficient provision prospectively to continue the work that is herein undertaken by the District. The County hereby specifically disclaims any assumption by it of liability or responsibility for the Flood Control Zone District as to those persons or entities who are not parties to this Agreement.

All commitments made by the County and the Flood Control Zone District in this Agreement are also subject to the availability of appropriated funds. Nothing in this Agreement, in and of itself, obligates either the County or the Flood Control Zone District to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations that would be inconsistent with their respective budget priorities. The other Parties agree not to submit a claim for compensation for services rendered to the County or Flood Control Zone District in connection with any activities they carry out in furtherance of this Agreement. Any transaction involving reimbursement or contribution of funds between the Parties to this Agreement will be handled in accordance with applicable laws, regulations, and procedures under separate written agreements.

V. RESERVATIONS

This Agreement does not create any right or benefit, substantive or procedural, enforceable by law or equity, by persons who are not party to this Agreement, against EPA, Ecology, the County, or the Flood Control Zone District, their officers or employees, or any other person. This Agreement neither directs nor applies to any person outside of EPA, Ecology, the County, or the Flood Control Zone District.

VI. EFFECT

This Agreement will take effect upon the signatures of the Parties below and remain in effect for a period of five years. This Agreement may be extended or modified, at any time per the mutual written consent of the Parties. Additionally, a Party may terminate its participation in this Agreement at any time by providing written notice to the other Parties, at least 60 days in advance of the desired termination date. In the event of such termination, independent obligations established by other legal documents will remain unaffected.

VII. WORKING GROUP CONTACTS

For Whatcom County:

Roland Middleton middle@co.whatcom.wa.us (360) 676-6876

For Whatcom County Flood Control Zone District:

Paula Cooper pcooper@co.whatcom.wa.us (360) 676-6876

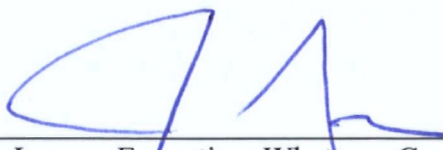
For Ecology:

Mary O'Herron mohe461@ecy.wa.gov (360) 715-5225

For EPA

Elly Hale Hale.ellie@epa.gov (206) 553-1215


VIII. SIGNATORIES



Jack Louws, Executive, Whatcom County, Washington, and
on behalf of the Board of Supervisors, Whatcom County Flood Control District

2/27/14

Date



Maia Bellon, Director, Washington State Department of Ecology

3/18/14

Date



Dennis McLerran, Regional Administrator, EPA Region 10

3/10/14

Date